PENDAKWA RAYA

v.

DAMSIN ISNAUN

HIGH COURT BORNEO, KOTA KINABALU
SYED AHMAD IDID J
[CRIMINAL APPEAL NO. 10 OF 1991]
13 MARCH 1992

CRIMINAL PROCEDURE: *Appeal by DPP against acquittal - Mere denial no defence - Inefficiency of investigation officers in tying up loose ends - Whether prosecution case made out - Identification of accused in parade - consequence.*

EVIDENCE: *Standard of proof for prosecution.*

The respondent was acquitted of charges under ss. 392 & 397 of the Penal Code in the Sessions Court on 8 July 1991. The prosecutor appealed against the acquittal.

Held:

Although the proper procedure on identification parades was not observed, three witnesses had identified the accused and technicalities should not be allowed to impede justice. Therefore, though the Court was unable to make a finding of guilt, a retrial was ordered before a different Sessions Court Judge in accordance with s. 316(a) of the Criminal Procedure Code.

[Order accordingly.]

Case referred to:
PP v. Chan Choong Keong & Ors. [1989] 2 CLJ (Rep) 300 ***(cit)***

Legislation referred to:
Penal Code, ss. 392, 397
Criminal Procedure Code, s. 316(a)

Other source referred to:
Sarkar, 13th Edn., p. 99

For Public Prosecutor - Rajendran a/l Nayagam, DPP

JUDGMENT

Syed Ahmad Idid J:

This appeal is by the Public Prosecutor against the acquittal of Damsin bin Isnaun, the accused, in the Sessions Court at Kota Kinabalu Criminal Case No. 18 of 1989. He was acquitted by the learned Sessions Court Judge on 8 July 1991 on charges under ss. 392 and 397 of the Penal Code.

I have read the grounds of decision which are lengthy from pp. 31 to 41 of the typed notes of proceedings. I have also read the grounds put forth by Mr. Rajendran a/l Nayagam, the learned Deputy Public Prosecutor. And today I heard the grounds in Court.

There are several aspects which are not illustrative of police efficiency. It is by now so well known that the prosecution must prove its case beyond reasonable doubt and this includes the investigation officers tying up all loose ends, following up on areas which are grey in order to confirm the information as “aye” or “nay”. In other words, should there be any

doubts, then it is the duty of the prosecution, if they wish to complete their duty as expected by the Courts, to clarify and produce witnesses on such points. According to the learned Sessions Court Judge, there were several aspects with which he was not satisfied. Additionally, the cross-examination of the accused did not shake him.

I accept that a mere denial is not a defence ... but this is true only if there are no circumstances and evidence to show otherwise.

The learned Sessions Court Judge stated that the defence had created a reasonable doubt on the prosecution's case. Why could not the investigation officer and the police improve upon their investigation? And why could not the prosecuting officer conduct the case with meticulous zeal so as to leave no doubts in the Court's mind? It is not the Court's function to guide the police or any other party as to what they must do but when there is lack of evidence it is the Court's duty to acquit.

Sarkar, 13th Edn., p. 99 sets out the way to hold a proper identification parade. The case of *PP v. Chan Choong Keong &Ors.* [1989] 2 CLJ (Rep) 300 also set this out.

Also the cases cited by the learned Deputy Public Prosecutor can offer guidance on this. I am surprised that the police continue to make mistakes time and again. Surely by now they must have a collection of DO's and DONT's to guide their officers?

I believe the accused has remained under remand since his arrest on 23 March 1989 and even after his acquittal by the Court on 8 July 1991, he is kept in. I hope it is not standard practice of the prosecution to try and have a second bite at the cherry, in this case to have another chance to improve their case.

I would have confirmed the learned Sessions Court Judge's decision except for the fact that three witnesses (PW1, PW2 and PW9) identified the accused. I am of the opinion that technicalities should not be allowed to impede justice despite the fact we are a Court of law.

On what has been said here and in the Court below, I am unable to find the accused guilty. But I can order (and I now do) that the accused be retried in accordance with s. 316 (a), Criminal Procedure Code, before a different Sessions Court Judge as soon as possible.

Also found at [1992] 3 CLJ 1742